92-1256

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
1992-93 Term

J. RAYMOND CLARK
and
ANNE LEWIS CLARK

Appellants

v.

DANIELLE CLARK
Appellee

On Writ of Certiorari To The District Of Columbia
Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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Pro Se and Counsel

(A)

QUESTIONS PRESENTED FOR REVIEW

1. Did the District of Columbia courts err in asserting jurisdiction over a claim in contract by Appellant's former spouse seeking a share of monies received by Appellant from his federally approved and governed "Keogh plan", where the former neither sought nor obtained a qualified domestic relations order as defined in 29 U.S.C. 1056 of the Employees Retirement Income Security Act (ERISA)?

2. Did the courts below err in failing to give precedence to federal law over state (herein District of Columbia) law as provided in 29 U.S.C. 1144?

3. Did the said courts err further in failing to declare the said contract claim barred by the prohibition against alienation or assignment of an interest in pension benefits provided in 29 U.S.C. 1056 (d), absent a qualified domestic relations order?

4. Did the said courts err, contrary to the intent of Congress, in failing to accord immunity from legal process to alleged Keogh plan benefits as provided in the ERISA implementing regulations, 26 CFR 1.401 (a) - 13 (b) (1)?

5. Did the courts below likewise err in disregarding the distinction in ERISA, confirmed by the legislative history, and incorporated into Appellant's plan, between the withdrawal of monies from the plan upon termination of employment and the payment of benefits under the plan upon eligibility for retirement?

6. Did the courts below err in failing to recognize the legal and/or economic consequences of a deduction for alimony under the federal tax laws that was an agreed condition precedent to any payment to Appellant's former spouse?

7. Did such courts err in failing to recognize the superior entitlement of a present spouse to a vested joint interest in pension monies in the absence of a prior qualified domestic order awarding such interest to a former spouse?

8. Did the courts below deny constitutional due process of law to Appellant Anne Lewis Clark in joining her as a necessary additional party to a claim based upon a separation agreement to which she was not a party and where service of process was made by certified mail beyond the permissible limits of the federal and DC rules? 1/

9. Finally, and most significantly, does the judgment below circumvent and frustrate the intent of Congress, recognized by this Court in Guidry 2/ that pension plan participants and their families receive the full measure of pension savings, whatever the merit of competing claims, and suggest a pattern for similar nullification of public policy by other state courts in the future?

1 / Appellant Anne Lewis Clark limits her prayer for review to the issues stated in Nos. 7 and 8 above.

2/ Guidry v. Sheet Metal Workers Pension Fund, 493 U.S. 365 (1990)

(C)

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*Senate Report No. 98-575, Aug. 2, 1984, U.S. Code Cong. &
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26 Code of Federal Regulations 1.401 (a) - 13 9, 20

(D)

REFERENCE TO OPINIONS BELOW

The opinions of the Superior Court of the District of Columbia and of the District of Columbia Court of Appeals in this cause below are unreported as of this time. Copies of same are included in the Appendix hereto.

(E)

STATEMENT OF JURISDICTION

(i) The Memorandum Opinion And Judgment of the District of Columbia Court of Appeals as to which review is sought herein is shown as having been filed on May 6, 1992.

(ii) The order of that court denying rehearing or rehearing en banc is shown as having been filed September 25, 1992.

(iii) N/A

(iv) Appellants believe that jurisdiction to review the above-described judgment and order is conferred upon this Court by the Supremacy Clause of the Constitution, and by 28 U.S.C. 1257 (2) and (3) in that a statute of the United States, most specifically, the Employees Retirement Income Security Act, 29 U.S.C. 1001, et seq., is here in issue. It is submitted that the above-referenced orders are a "final judgment" within the purview of the former section of Title 28, not withstanding a limited remand, in that the federal questions presented have been finally resolved. 3/

3/ Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L.Ed.2d.328,95 S.Ct. 1029 (1975); Pennsylvania v. Ritchie, 480 U.S. 39, 94 L.Ed.2d. 40, 107 S.Ct. 989 (1987); New York v. Cathedral Academy, 434 U.S. 125, 54 L.Ed.2d. 346, 98 S. Ct. 340 (1977)

(F)

STATUTES AND REGULATIONS INVOLVED

Central to the federal questions here involved are various provisions of ERISA, most notably Sections 1132 (Civil Enforcement), 1144 (preemption of state law) and 1056 (prohibition against alienation and joint interest of present wife) of Title 29 of the United States Code. The portions of these sections believed to be most pertinent to the issues here are quoted in the Appendix. Likewise quoted there are portions of 26 C.F.R. 1.401 (a) - 13(b), (1), ERISA implementing regulations.

Also involved, albeit to a more limited degree are the due process provisions of the Constitution, pertinent in the context of Rules 4 (e) and 19 of the Rules of the Superior Court, copied from the corresponding Federal Rules, and the provisions of the Internal Revenue Code relating to the definition of deductible alimony.

(G)

STATEMENT OF THE CASE

Appellant, J. Raymond Clark (hereinafter "Ray") was formally separated from his then wife, Appellee, Danielle J. Clark (hereinafter "Danielle") upon execution of a written separation and property settlement agreement on March 1, 1976. The parties were later divorced on February 27, 1979 but, significantly, the agreement was not merged into the divorce decree. Ray was subsequently married to his present wife, Appellant, Anne Lewis Clark (hereinafter "Anne") on June 18, 1979.

In December, 1986, after he had ceased the active practice of law, closed his Washington office, moved to Georgia and terminated his Keogh plan sponsored by the American Bar Association, as the terms of that plan required upon closing of his office, Ray was served with the subject complaint of his former spouse. By that complaint, served under the "long arm" statue of the District of Columbia,

Danielle sought specific performance and damages, as further alimony, for alleged breach of Paragraph 4 of their 1976 separation agreement. The terms of that paragraph are critical to the present inquiry and it is here reproduced in its entirety for the convenience of the Court.

> It is agreed that all payments made by Husband under the so-called Keogh Plan (Qualified Retirement Plan) in the past and to be made in the future, are the joint property of the parties. At such time as the Husband elects to receive benefits under this plan, such benefits when received by Husband shall be divided equally between the parties and any such payments shall be considered to be alimony at that time. The foregoing provisions of Paragraph 4 include the shares of Putnam Growth stock purchased under the Keogh Plan which are registered in the name of wife. (emphasis supplied).

There were no other provisions in the agreement relating in any way to the pension plan and, hence, no requirement that Ray have a plan, maintain a plan, contribute to a plan or refrain from terminating that plan at any time. Ray did in fact, however, continue to make contributions to the plan until he closed his office in April, 1986. All but $25,000 of the monies later disbursed from the plan were contributed and/or accrued after the separation date and for the most part, also, after Ray's marriage to Anne.

Prior to the drafting of the agreement Ray provided a copy of the ABRA plan then in place to Danielle's counsel. The record shows that neither her counsel, who was the draftsman of the entire agreement, or either of the parties was then aware of the enactment of ERISA, effective the prior year.

After discovery and numerous related cross-pleadings, Ray, acting as his own counsel, filed a motion to dismiss the complaint for lack of subject matter jurisdiction, relying upon the closely correlated civil enforcement, anti-alienation and preemption provisions of ERISA (29 U.S.C. 1132, 1056 and 1144, respectively). The motion was

argued before D.C. Superior Court Judge Wertheim on July 11, 1988. At the conclusion of the argument, the court, albeit conceding that Ray had raised some "interesting" questions, denied the motion (App. B-9), expressing the opinion that the issues were local rather than federal in nature and properly before the Superior Court for determination under the contract laws of the District of Columbia. The parties there conceded and the court held that there was no concurrent jurisdiction in the District under the civil enforcement provisions of ERISA.

A number of motions and cross motions then ensued, including Danielle's motion to join Anne as an additional necessary party defendant under Rule 19 (similar to the corresponding rule of the FRCP). More significantly, Ray filed a motion for summary judgment relying both upon the preemption and anti-alienation provisions of ERISA and the further showing, supported by exhibits, that there was no breach under local law because, as provided in the plan - and ERISA - he was not eligible, agewise, for retirement "benefits" and had withdrawn his monies from the plan as required by its terms upon mandatory termination of the plan by abandonment of his practice. 4/ He also undertook to demonstrate that the agreed condition in Par. 4 of the agreement that any payment be deductible alimony was impossible of fulfillment under the federal tax provisions, because a lump sum judgment was sought.

Danielle filed a cross motion for summary judgment, asserting the inapplicability of ERISA's provisions to her complaint and urging entitlement to damages under D.C. contract law. 5/ All pending motions, notably including those for summary judgment, were argued before Superior Court Judge Goodrich, to whom the case had earlier been assigned, on December 5, 1990.

On December 14 of that year the court entered the order attached as Appendix II-C. In substance, Judge Goodrich found (1) that there were no material facts in dispute (p.5); that Danielle never

4/ Ray was administrator of the plan as well as a participant.

5/ Her response to the distinction made by Ray between a "withdrawal" and plan "benefits" was the argument, based upon a dictionary definition, that receiving money is always beneficial

became an assignee or beneficiary of an interest in the fund (p.5); (3) that ERISA did not apply to the case, which should be decided under local contract law (p.6); that Ray had elected to receive and did receive "benefits" under his plan (p.6); and that Danielle was entitled to judgment for one-half of the gross amount withdrawn from the fund or $139,918. Danielle's motions to join an additional party, for injunctive relief and to compel were denied as moot subject to payment of the judgment.

By subsequent orders of January 29, 1990 and April 27, 1990, the court denied Ray's motion for reconsideration, clarification and amendment of order and judgment and granted, then denied and later apparently reserved on Anne's motion for reconsideration of her joinder as an additional party.

Appellants filed a joint notice of appeal on March 1, 1990, Anne limiting her participation to the issues of joinder and invalid service. Subsequent to the filing of briefs and oral argument the District of Columbia Court of Appeals entered the Memorandum Opinion and Judgement of May 6, 1992 that is the subject of this petition for review. In that Opinion the court affirmed the orders of the Superior Court in every respect with but a single exception. Recognizing that it was the intent of the parties to the separation agreement that any payment made by Ray to Danielle be deductible under the federal tax laws as alimony, 6/ the court remanded for revision of the judgment to allow a credit for federal taxes paid on the money said to be owned to Danielle. (Appendix I, p.4)

Appellants timely filed a petition for rehearing or rehearing en banc, citing errors of law both under principles established by the D.C. courts and under federal law, specifically ERISA and the Internal Revenue Code. That petition was denied per curiam by Order of September 25,1992. (Appendix III-4). On October 2, 1992, Appellants filed a motion for stay of mandate pending application for certiorari which was denied by the D.C. Court of Appeals November 4, 1992 (Appendix III-B).

6/ No consideration was given to the fact that in many jurisdictions, including D.C. and Georgia, federal tax deductions likewise reduce gross income for state tax purposes.

(H)

STAGE AT WHICH FEDERAL QUESTIONS RAISED BELOW

Federal questions were first raised in the trial court by the Motion and Memorandum of Points and Authorities In Support of Defendant's Motion to Dismiss or, Alternatively, To Stay Action For Inconvenient Forum, dated January 14, 1987. Such questions were raised again in the Answer dated November 4, 1987, and were addressed in detail in Ray's Motion To Dismiss For Lack of Subject Matter Jurisdiction, dated April 29,1988, which was both argued and denied in a bench ruling on July 11, 1988. (See Appendices II-A and B)

Federal questions were first raised in the appellate court, by the notice of appeal filed March 1, 1990 and by the designation of issues on appeal and were argued upon brief and orally. (See Appendix I, pp. 1-2).

(I)

Not applicable

(J)

ARGUMENT

1. Summary of Argument

This Court has undertaken to review a number of ERISA - related cases in decisions that leave no doubt as to thrust, scope and intent of that very comprehensive legislation. Albeit not in the precise factual context of this proceeding, this Court has addressed in unmistakable fashion those three preeminent provisions of ERISA that were repeatedly raised below in defense of the claim, under local contract law, to a share in pension monies, i.e. civil enforcement jurisdiction (29 USC 1132), preemption of state law (29 USC 1144) and the so-called "spendthrift clause" prohibiting assignment or alienation of benefits. (29 USC 1056 (d).

The first of these provisions gives the district courts of the United States exclusive jurisdiction over any ERISA - related claim to a share of pension benefits, except an action against the plan itself. The second supersedes local law, notably including breach of contract claims, with federal statutory and / or common law, particularly where, as here, the Congress has provided an express remedy for a former spouse claimant. And the third prohibits assignment, whether voluntary or pursuant to legal process, of an interest in pension benefits, absent a qualified domestic relations order, as defined, conceded not to be present here. Further, even assuming arguendo, that Ray had in fact received "benefits", as defined, under his retirement plan, Congress has mandated, as a matter of public policy, that such benefits be protected against diversion from a plan participant and his family.

In Nachman Corp. v. Pension Benefits Guaranty Corp., 446 U.S. 359, 361, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980), this Court recognized ERISA to be "comprehensive and reticulated", with a "network" embracing every aspect of a federally-governed and protected pension plan, of which the involved plan is one, both procedural and substantive. Nachman is also of particular significance here with respect to the factual determination upon which the Superior Court judgement is predicated, i.e. the issue of "benefits" under the plan (the agreement language) verses withdrawal of monies before eligibility for retirement. Noteworthy in the context of Nachman, which involved plan termination and vesting of pension rights, is the legislative history providing for "lump sum distribution upon termination of the plan (Senate Report No. 98-575, p. 2570), which is precisely what occurred here.

2. The D.C. Courts Lacked Subject Matter Jurisdiction

The jurisdictional provisions of ERISA are set forth in 29 USC 1132 quoted in pertinent part in Appendix IV and state in substance that a participant or beneficiary may sue in state court under subsection (a) (1) (B) under concurrent jurisdiction only to recover benefits due him under the terms of his plan or to enforce or clarify his rights under his plan. The action here was not brought against the plan nor did Danielle claim entitlement to a share of benefits under the terms

of the plan; she relied solely upon paragraph 4 of the separation agreement set forth at page 10, supra. With this single exception noted the statute confers exclusive jurisdiction upon the federal district courts over pension plan claims, including an action under (B) "to obtain other appropriate relief". There was good cause for this strict limitation of jurisdiction by the Congress, since no court, except a federal court, can be relied upon to apply governing federal legal standards. Cotler v. Intercounty Orthopaedic Assn. Pa., 526 F.2d 537, 530 F.2d 536 (3rd Cir. 1975, 1976). Even more forceful is the criticism by the 7th Circuit of a district court ruling because it "relegated" defendant "to a sterile state court" for vindication of his federal remedies. McGough v. First Arlington National Bank, 519 F.2d 552 (1975).

The rulings of the courts below with respect to jurisdiction are inconsistent and, in large measure, inexplicable. Superior Court Judge Wertheim, as noted found no concurrent jurisdiction although he recognized Danielle to be beneficiary. 7/ Holding that jurisdiction was either exclusively federal or exclusively local, he opted for the latter conclusion. But, subsequently, Judge Goodrich, in his order of December 14, 1990 found that Danielle was neither a beneficiary nor an assignee of the pension plan in rejecting both federal jurisdiction and the mandates of ERISA. (II-C) The appellate court's holding that Danielle had acquired a joint interest in the pension fund, apparently the basis for affirmance of the lower court's view of the case, cannot be reconciled with the latter's finding that she never became an assignee-which certainly squares with 29 USC 1056 (d)-and, hence, could not have acquired any interest in the monies in the plan.

It is indisputable here that both the complaint, by seeking a share of alleged retirement "benefits", and most certainly, the defense, raised significant ERISA issues. The judgment rendered by the trial court is expressed in terms of a one-half share of such benefits. This Court has repeatedly recognized the paramount su-

7. Salomon v. Transamerica Occidental Life Ins. Co., 801 F.2d 659 (4th Cir. 1986) held that the fiancee of a deceased employee who claimed the latter's benefits under state breach of contract law, was an ERISA "beneficiary, entitled to bring the claim, as to which, the court further ruled, state law was preempted.

premacy of the federal courts where ERISA questions have been presented, whether by complaint or by way of defense. Noteworthy in this regard are the twin decisions in Taylor and Pilot Life. 8/

In Pilot Life, decided the same day as Taylor, the state law claim was for "tortious breach of contract". The Court held that unless state common law causes of action fall under an exception to §514 (a) of ERISA, they are expressly preempted; that ERISA's civil enforcement provisions provide the exclusive vehicle for ERISA participants or beneficiaries, with the federal remedy displacing state causes of action. (95 LEd. 2d at 48, 54). The court added: "The civil enforcement scheme of §502 (a) is one of the essential tools for accomplishing the stated purposes of ERISA". (95 LEd. 2d at 51)

Notwithstanding the fact that the claim did not call for enforcement of ERISA, the defense does and that is sufficient to invoke federal jurisdiction and federal law. This is made abundantly clear in Taylor, as well as other decisions. In Taylor, this Court, in a unanimous decision by O'Connor, J., recognized that the complaint purported to raise only state law causes of action, but held that it was necessarily federal in character, raised federal issues of law and arose under the laws of the United States, and, because Congress has manifested the intent that once preempted by ERISA and displaced by the civil enforcement provisions of that Act, it was, hence, removable. Pointing out that the "Touchstone" is not the obviousness of the preemption defense, but rather the intent of Congress, the Taylor court said:

> Indeed, as we have noted, even an 'obvious' preemption defense does not, in most cases, create removal jurisdiction. In this case, however, Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of §502 (a) removable to federal court. (95 L.Ed.2d. at 65).

The instant proceeding fully confirms the wisdom of the Congress in insulating Keogh and other pension plans from the

8. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed. 2d 55 (1987), Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 980, 95 L.Ed. 2d 39 (1987).

ravages of state domestic relations courts, except as the limited powers of such courts are expressly delineated in ERISA. (e.g., the "qualified domestic relations order")

3. ERISA's Broadest Possible Preemption Clause Embraces The Involved District of Columbia Action

Even if it be assumed, arguendo, that the District of Columbia Courts properly acquired jurisdiction over the cause, the judgment is no less improper. They erred in deciding the merits of the claim under local contract law rather than federal law. 29 USC 1144 makes it abundantly clear that state law is superseded by federal law "insofar as they [state laws] may now or hereafter relate to any employee benefit plan", again with the special exception carved out in subsection (b) (7) of that provision for a qualified domestic relations order. Here, as earlier shown the only subject of the complaint was the Keogh plan in which Ray was a participant as well as the Employer.

The latter, in early presenting his motion to dismiss in the Superior Court relied in substantial measure upon the decision of this Court in Shaw v. Delta Airlines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed. 2d. 490 (1983).

The Court's decision there of ERISA's preemption clause is a worthy of quotation at some length:

> In fact, however, Congress used the words relate to in §514 (a) in their broadest sense. To interpret §514 (a) to preempt only state laws designed to affect employee benefit plans would be to ignore the remainder of §514. It would have been unnecessary to exempt generally applicable state criminal statutes from preemption in §514 (b), for example, if §514 (a) applied only to state laws dealing specifically with ERISA plans.
>
> Nor, given the legislative history, can §514 (a) be interpreted to preempt only state laws dealing with the subject matters covered by ERISA-reporting, disclosure, fiduciary responsibility, and the like. The bill

> that became ERISA originally contained a limited preemption clause, applicable only to state laws relating to the subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language . . . Statements by the bill's sponsors during the subsequent debate stressed the breadth of the federal preemption, (463 U.S. at 98).

In sum, this Court interpreted the preemption clause as embracing the application of state law to actions in any way connected with a plan, even though the plan itself was not involved, just as the jurisdictional provisions of ERISA clearly transcend actions against the plan itself.

The Shaw interpretation of ERISA's preemption clause was not lost upon the lower federal courts. Noteworthy among the cases implementing Shaw's ruling as to the scope of ERISA's preemption mandate are the decisions of the Fourth Circuit in Holland v. Burlington Industries, Inc., 772 F. 2d 1140(1985) and Powell v. Chesapeake & Potomac Telephone Co. of Va., 780 F. 2d 419 (1985); cert den. 476 U.S. 1170, 106 S.Ct. 2892, 90 L.Ed.2d 980 (1986). The crucial inquiry is not the purpose of the action but its relationship to an ERISA pension plan, Authier v. Ginsburg, 757 F.2d. 796 (6th Cir., 1985). cert den. 474 U.S. 888 (1986). Succinctly stated, state common law is preempted if the dispute has its "genesis" in an employee benefit plan. Hollenbeck v. Falstaff Brewing Co., 605 F. Supp. 421 (E.D. Mo. 1984); aff'd 780 F.2d 20 (8th Cir.1985).

Clearly, the claim here relates to nothing other than such a plan and it necessarily follows that the D.C. contract law principles upon which the lower courts here relied, even had they been correctly applied, 9/ were supplanted by federal law, in view of the broad

9. In point of fact, of course, the D.C. Court of appeals failed here to recognize it own oft-stated principles of law in several major respects. To illustrate, it affirmed a summary judgement where the critical material fact relied upon by the trial court, the alleged receipt of "benefits under this plan", had been disputed with compelling extrinsic evidence. Further, it undertook to rewrite an unmerged separation agreement containing a deductible alimony condition precedent by remanding for a tax credit which is neither legally nor economically the equivalent.

scope of ERISA's preemption clause.

No less persuasive of the error of the District of Columbia courts in ignoring federal law is the holding in Murphy v. Happenstall Co., 635 F. 2d 233 (3rd. Cir., 1980). The court there stated in pertinent part:

> Moreover, except for explicitly exempted plans, ERISA wholly regulates and federalizes the pension field. Section 1144 preempts any state law relating to ERISA-covered pension plans. Furthermore, like the Taft-Hartley Act grant of jurisdiction over labor-management contracts, ERISA, in Section 1132 (a) and (e), confers jurisdiction over actions concerning rights and benefits under a pension plan. In enacting ERISA, Congress authorized the evolution of a federal common law of pension plans. (635 F. 2d at 237)

4. Relief Here Is Barred By ERISA's "Spendthrift" Clause

In addition to protecting against state court frustration of ERISA's public policy by providing for federal court jurisdiction and superseding federal law, the Congress, by the so-call "spendthrift" provisions of 29 U.S.C. 1056 (d) (Appendix IV) has also precluded improvident action by the plan participant himself, akin to common law voidability of contracts by minors. As this section was first enacted in 1974, the prohibition against assignment or alienation of plan benefits was absolute and without exception. Notwithstanding, some state domestic relations courts, notably in community property states, held that provision to be inapplicable to spouse or children. (e.g., Stone v. Stone, 632 F. 2d. 740 (9th Cir. 1980)

Cognizant of this situation, the Congress undertook to both clarify and modify the anti-alienation provision in the Retirement Equity Act of 1984. The two major changes wrought by the 1984 ERISA amendments that are pertinent here are (1) the creation of a joint interest in pension monies in a plan participant's spouse, Anne in this instance, that can only be divested by (2) the "special remedy" of the qualified domestic relations order. In the latter regard, the Congress said:

> Reasons for change
> The Committee believes that the spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension plan to be divided under certain circumstances. In order to provide rational rules for plan administrators the committee believes that conforming changes to the ERISA preemption provision are necessary to insure that only those orders that are excepted from the spendthrift provisions are not preempted by ERISA. (Senate Report No. 98-575, (emphasis supplied).

Here Danielle seeks precisely what the Congress was there referring to, a division of "benefits under a pension plan", as to which the only order that the District of Columbia might have entered pursuant to a claim under local law, but a remedy that was never invoked, was the qualified domestic relations order as defined in the Act.

Commenting upon the legislative delineation of available remedies, this Court said in Taylor, supra:

> As we have made clear today in Pilot Life "the policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undetermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." (95 L. Ed. 2d at 63-64)

Clearly, Congress rejected all state law remedies for a former spouse seeking a share of pension benefits other than the qualified domestic relations order.

This Court recently had occasion to review the ERISA spendthrift clause in great depth in Guidry v. Sheet Metal Workers Pension Fund, 493 U.S. 365 (1990)

In that case, Guidry, a former officer, pleaded guilty to

embezzling funds from his union. He agreed to entry of a judgment against him in the latter's favor. When he applied for his benefits from the union's separate pension fund, the Court of Appeals imposed a constructive trust upon those funds to satisfy the judgement. This Court reversed and remanded, referring to the anti-alienation clause of ERISA and the implementing regulations at 26 CFR 1.401 (a)-13(b) (1), summarized in footnote 10 of the decision. In sum, this Court held that the public policy mandate of ERISA is so clear that even a convicted felon cannot be deprived of his benefits by the victim of his wrongdoing. To the same effect see the earlier decision in Vink v. SHV North America Holding Corp., 549 F.Supp. 268 (S.D.N.Y. 1982). This Court summarized its rationale in Guidry as follows:

> Nor do we think it appropriate to approve any generalized equitable exception-either for employee malfeasance or for criminal misconduct-to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206 (d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless) even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for the Congress to undertake that task. (493 U.S. at 376).

In accompanying footnote 18, the Court pointed out that the Congress had, indeed provided an exception for a qualified domestic relations order, to which reference has earlier been made.

There was some suggestion in the several court proceedings here that pension benefits lost their legislative protection once they were received. This argument would attribute to Congress an exercise in futility if pension savings were only to be safeguarded before pensioners actually needed "the stream of income" in their retirement years. In point of fact, of course, the CFR section referenced by the Court in Footnote 10 refers to "benefits provided", i.e., in the past, as do the other federally protected retirement benefits cited by the Court in Footnote 13 of Guidry. In short, even if the

orders of the courts below were otherwise proper, the legal process of the District does not extend to what those courts have characterized as pension "benefits".

5. ERISA Distinguishes Between Benefits Upon Retirement And Withdrawals Before Retirement Eligibility.

The principal factual issue before the trial court was whether Ray had elected to receive and had in fact received "benefits under this plan", the condition precedent to any liability under Paragraph 4 of the separation agreement. He introduced a number of exhibits to establish pre-retirement age withdrawal upon the closing of his office pursuant to the provisions of his plan, including the disbursement notice from the plan trustees. Notwithstanding, Judge Goodrich found that Ray had elected to receive and had received "benefit [s]" although there was but one lump sum payment, and granted summary judgment for Danielle on the basis of this finding. (Appendix II-A).

ERISA, its legislative history and the plan - which must conform to ERISA to receive IRS approval - provides for the withdrawal of plan monies by any participant upon termination of employment or of the plan itself. In this instance the plan terminated by its own terms when Ray closed his office. Since he was then age 64 he was not eligible for retirement benefits as his plan did not vary from the ERISA age 65 retirement eligibility provision. (29 U.S.C.1055). The courts below rejected any reliance upon ERISA, however. Indeed, notwithstanding the reference in the agreement to "benefits under this plan", there is no indication they ever looked at the plan.

The distinction urged by Ray below was the subject of comment in the legislative history of ERISA, which, as earlier noted, recites provision in the act for "lump sum distribution upon termination of the plan". (Senate Report No. 98 - 575, Aug. 2, 1984, U.S. Code Cong. & Admin. News, 98th Cong., 2d. Sess. Vol 4, p. 2570).

6. Anne Clark Could Not Properly Be Joined, Served With Process Or Deprived Of Her Joint Interest In The Pension Fund Conferred Upon Her By ERISA.

The rulings below with respect to Anne, who married Ray in 1979, to the extent they can be fathomed, do violence to established principles of constitutional due process of law. Further, of course, they completely ignore the "Reasons For Change", previously quoted (supra, p. 18) that gave rise to the 1984 ERISA amendments.

Anne obviously was not a party to the 1976 separation agreement between Ray and his former spouse and no basis for any cause of action against her has ever been suggested either by Appellee or the D.C. courts. The fact that a judgment against Ray may affect Anne is not a basis for joinder. It is the nature of the claim, here alleged breach of contract by Ray, that is determinative of joinder. Stevens v. Loomis, 334 F.2d. 775 (CA Mass. 1964) ; Kuchenig v. California Co., 350 F.2d. 551 (CA La. 1965) ; cert. den. 86 S.Ct. 561,382 U.S. 985, 15 L.Ed.2d. 473 (19). Non-parties to the contract in issue are not indispensable parties. Special Jet Services, Inc. v. Federal Ins. Co., 83 F.R.D. 591 (D.C. Pa. 1979 ; Savoia Film S.A.I. v. Vanguard Films, 10 F.R.D. 64 (D.C. N.Y. 1950); R.C. Hedreen Co. v. Crow Tribal Housing Authority, 521 F.Supp. 559 (D.C. Mont. 1981). To the same effect, neither the donee under a contested will nor the non-debtor wife of a debtor in bankruptcy is an indispensable party. Hale v. Campbell, 127 F.2d.594 (CCA Iowa, 1942) ; In re Cleveland Bankruptcy, 53 B.R. 814 (Va. 1085).

Furthermore, even if Anne could conceivably have been deemed a necessary party at a time when the case had already been disposed of by a grant of summary judgment against Ray, she was not properly served. Rules 19 and 4 (e) of the Superior Court rules track from the corresponding rules of the F.R.C.P. Service upon her by certified mail in Georgia does not satisfy the so - called "bulge" provision of the latter rule, incorporated into Rule 19. Due process of law has been cavalierly disregarded by the D.C. courts in this regard.

Moreover, Anne's vested rights under ERISA have likewise been totally ignored. The courts below never addressed the question of whose one-half interest in the pension fund they were undertaking to award to Danielle. Certainly, Ray, as the participant, was

entitled to at least a joint interest in the plan under ERISA, which the agreement here sought to be enforced concedes. But Anne, as Ray's spouse was given a joint interest in his pension plan by the 1984 amendments previously discussed. That interest could only be divested by a qualified domestic relations order (29 U.S.C. 1056 U).
There having been no such order Anne's interest was fully vested when the monies were withdrawn with her written consent. Significantly, at no time did Danielle ever claim a joint interest in the plan superior to that granted Anne, as the spouse of the plan participant by the Congress.

7. The Appellate Court Below Misconstrued The Nature And Effect Of An Alimony Deduction Under Federal Law.

Even the very limited remand distorts acknowledged Federal Law which is very clear as to what constitutes "alimony" under the Internal Revenue Code. The rationale and substance of the remand by the D.C. Court of Appeals is as follows:

> It appears that under the agreement, the parties intended that any such benefits received by the husband and divisible equally between them would be 'considered to be alimony' and hence payment to the wife would be in such fashion that he could claim a tax deduction (and she pay the income tax) on her share..... Appellant asserts that this is impossible under Internal Revenue Service Regulations concerning 'lump sum' alimony payments... In her brief on appeal appellee did not dispute either point. Thus, it appears that to effectuate the parties' understanding in the agreement, appellant is entitled to a credit against the approximately $139,819.00 owed appellee for the amount of federal income tax he paid on that amount. The parties should compute this figure and present it to the trial court as a revision of the judgment. (App. I , pp. 3 -4).

The appellate court has thus recognized that Ray raised an important issue under the Internal Revenue Code; however, the attempted resolution of this issue is not consistent with the agreement by the lower court. There is a vast difference, both legally and economically, between an alimony deduction and the federal tax

"credit" referred to an inexpert non-federal domestic relations court for determination.

Moreover, the alimony deduction was an integral part of the agreement that Danielle asked be specifically performed, indeed, a condition precedent to "any" payment. Impossibility has always been recognized as a valid defense. If, as these petitioners contend, and appellee apparently concedes it is impossible under federal law for Ray to claim an alimony deduction for a lump sum property settlement payment to Danielle, the agreement cannot be enforced in any part. 10 /

CONCLUSION

The record in this case is replete with federal questions, timely raised and fully argued below, which were either incorrectly answered by the lower courts, or, for the most part simply brushed aside. The award of a judgment to a former spouse for a share of pension plan "benefits" by the District of Columbia courts, other than by a "qualified domestic relations order", violates both the letter of ERISA and its implementing regulations, and the public policy declared by the Congress and recognized by this Court.

Review upon writ of certiorari is prayed.

10/ See Note 39 to 26 USC 215 (a)

Respectfully submitted,

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